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No. 85-199

In the Supreme Court of the United States

OCTOBER TERM, 1985

DELLINGER, INC. AND THEODORE C. DELLINGER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion under Fed. R. Evid. 404(b) by admitting evidence of similar criminal acts to show petitioners' intent to enter into an unlawful conspiracy in this case.

2. Whether Fed. R. Evid. 608(b) prohibits the introduction of extrinsic rebuttal evidence on a material issue where the evidence shows prior criminal conduct by a defendant.

3. Whether the trial court was required to instruct the jury that it must find not only that the defendants in this case knowingly conspired to rig bids, but also that they specifically intended thereby to restrain trade.

4. Whether the trial court's instruction on reasonable doubt constitutes reversible error.

5. Whether a magistrate's comment regarding certain evidence read to the jurors during their deliberations constitutes reversible error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-32) is reported at 760 F.2d 527.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33) was entered on April 22, 1985. A petition for rehearing was denied on June 6, 1985 (Pet. App. 34). The petition for a writ of certiorari was filed on August 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Dellinger, Inc., and Theodore C. Dellinger, its president, were convicted on one count of violating Section 1 of the Sherman Act, 15 U.S.C. 1, and on two counts of submitting false statements to the government, in violation of 18 U.S.C. 1001. The corporation was fined a total of $170,000. Mr. Dellinger was fined $15,000 on the

Sherman Act count and given concurrent sentences of three years' imprisonment, with all but six months suspended in favor of three years' probation, on each count. Pet. App. 35-36. The court of appeals affirmed (Pet. App. 21-32).

1. The charges arose from a scheme to rig bids on a federally funded sewer construction project in Lancaster County, South Carolina. The project had been divided into four sections for bidding purposes. Representatives of all four winning bidders — Dellinger, his co-defendant, H.P. "Joe" Lee of Smith Grading and Paving, Inc., and government witnesses Frank Carpenter and B.S. "Steve" Zeigler[1] — stayed at the same motel on December 18, 1978, the evening before the bidding, and had dinner with a group of other contractors and suppliers. According to Carpenter's and Zeigler's testimony, they met afterwards in Zeigler's room and agreed to divide the four sections among themselves and to submit complementary bids for each other (J.A. 178-182, 400-410). To implement the agreement, they twice contacted representatives of seven other potential bidders, first to determine whether they would cooperate, and later to give them figures above which other bids should be (J.A. 402-405).

Two of these seven potential bidders were at the same motel. The evidence at trial included records of two telephone calls to each of four others the following morning and one telephone call to the fifth, who came to Lancaster in person on the morning of December 19. The bid preparation sheets for one of the other firms contained figures that

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[1]Carpenter and Zeigler were testifying pursuant to earlier plea bargains with the government. Zeigler had pleaded guilty to bid rigging on the Lancaster project. Carpenter, whose family had a substantial financial interest in Dellinger, Inc. (J.A. 165-170, 222-223, 529-537), had pleaded guilty to bid rigging on a project in North Carolina and had agreed to testify in return for not being prosecuted in other cases. ("J.A." refers to the Joint Appendix in the court of appeals.)

were identified as "numbers that we were supposed to bid above" (J.A. 267, 285-288, 295, 847). All of the winning bids were below these figures, and all but three of the aggregate 27 losing bids were above them (J.A. 845). Finally, the winning bidders' gross profits on the projects were all much higher than the industry norm of 15% to 20% of project costs (J.A. 195, 427); for example, Dellinger's was 32.5%, even though there were eight competing bidders (J.A. 473-475).

2. In the course of his testimony, Carpenter enumerated three other incidents in 1978 and 1979 in which petitioner Dellinger had participated with him in rigging bids (J.A. 201-207). The trial court followed this testimony immediately with a jury instruction, which was repeated in the final charge, that the evidence was to be considered only with respect to Dellinger's intent, motive, or knowledge, and only if the jury found beyond a reasonable doubt from other evidence that Dellinger had done the acts charged in the indictment (J.A. 207-209, 774-775).

Dellinger testified that he had contacted all of the other potential bidders on the Lancaster project, with the exception of Carpenter, but only to seek subcontracts on the sections that he did not intend to bid as prime contractor (J.A. 489-490, 495, 497). He said that he had dinner with a "large group" of suppliers on the evening of December 18, but he did not recall whether Zeigler, Carpenter, or co-defendant Lee were there, and he denied going to Zeigler's room after dinner (J.A. 491-493). Dellinger said that he met Zeigler only on the morning of December 19 to seek work as a subcontractor and to give him prices for that purpose (J.A. 495-501). He denied seeing or contacting Carpenter, whom he had known for years and whose family owned 20% of the stock in Dellinger, Inc., until the bid opening (J.A. 505, 508, 530-531, 620-621).

On cross-examination, the government questioned petitioner Dellinger, without objection, about the other incidents of bid rigging to which Carpenter had testified, and Dellinger denied recollection of them (J.A. 567-589). He also testified that he had not turned in or received a complementary bid on any other project and that he could not recall discussing what he was going to bid on any other project (J.A. 565-566). When asked specifically about a project in the Kensington area of Georgetown County that had been bid on May 15, 1979, he testified that there had been abortive negotiations for a joint venture but that they had ended before any bid figures were exchanged (J.A. 589-594). On rebuttal, the government introduced testimony that Dellinger and representatives of two other firms had "swapped the bottom line number" on their bids for that project after the bids had been prepared but did not change them (J.A. 734-735).

2. The court of appeals affirmed the convictions (Pet. App. 21-32). The court held that evidence of Dellinger's participation in other bid rigging incidents was probative of his knowledge and intent in entering the Lancaster conspiracy and that the district court had not abused its discretion under Fed. R. Evid. 404(b) in admitting it (Pet. App. 26-27). In addition, it held that, if it met the qualifications of Rule 404(b), similar extrinsic evidence was admissible on rebuttal under Rule 608(b) to the extent it was probative of a material issue in the case and not offered solely for the purpose of attacking a witness's credibility (Pet. App. 25). The court noted, however, that trial courts should scrutinize such rebuttal evidence carefully to be certain that it is not unnecessarily cumulative, and that a defendant remains free to object if the underlying cross-examination goes beyond the scope of the direct (*id.* at 26).

The court of appeals also rejected petitioners' challenges to the trial court's jury instructions. The court held that in the case of a conspiracy that is unlawful per se under Section 1 of the Sherman Act, the jury need find only that the defendants intentionally participated in the illegal conspiracy, and that it is unnecessary to instruct the jury that it must find a specific intent to restrain trade unreasonably (Pet. App. 29-30). The court also held that the trial court's definition of "reasonable doubt" in this case, read in its entirety, was "neither incomprehensible nor sufficiently misleading" to constitute reversible error (*id.* at 30-31). Finally, the court found that any prejudice that might have been caused by the magistrate's comment to the jury that Zeigler's testimony went "more directly into the circumstances that you want to hear" than Carpenter's testimony was rendered harmless by the magistrate's subsequent explanation that he meant only that Zeigler's testimony had less introductory material (*id.* at 31).

ARGUMENT

The decision of the court of appeals is correct, and the petition raises no significant issue of law that warrants review by this Court.

1. Petitioner contends (Pet. 9-10) that the trial court erred in admitting under Fed. R. Evid. 404(b) Carpenter's testimony about petitioners' other bid rigging activities. This contention is without merit.

Rule 404(b) excludes evidence of other crimes only to the extent that it is offered "to prove the character of a person in order to show that he acted in conformity therewith." Such evidence is admissible, however, if it is relevant to another material issue, such as motive, intent, or plan. The various courts of appeals have consistently held that proof of similar bad acts is relevant to show intent to participate in a conspiracy unless the defendant affirmatively takes the

issue of intent out of the case. See, *e.g.*, *United States* v. *Kopituk*, 690 F.2d 1289, 1334-1335 (11th Cir. 1982), certs. denied, 461 U.S. 928 and 463 U.S. 1209 (1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980); *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978).[2] In this case, the other crimes evidence was introduced to demonstrate petitioners' intent and plan, not bad character. And, contrary to petitioners' claim (Pet. 10), Dellinger did not take the issue of intent out of the case. He pressed it at trial and in the court of appeals (see Pet. App. 29-30) and, indeed, continues to press the issue in this Court (see Pet. 16-18).[3]

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[2] *United States* v. *Powell*, 587 F.2d 443 (9th Cir. 1978) (see Pet. 9-10), does not conflict with this line of authority. In *Powell*, the district court refused to admit other crimes evidence to prove intent. The court of appeals approved this decision, stating that "intent is not a material issue" when the defendant denies participation in the crime. 587 F.2d at 448. This comment is clearly dictum, as the court of appeals noted in a subsequent appeal. *United States* v. *Powell*, 632 F.2d 754, 758 (9th Cir. 1980). In any event, the court's comment seems to turn on its finding that "[t]he only factual issue" in the case was the identity of the source of the enormous quantity of marijuana involved—approximately 3,500 pounds (587 F.2d at 448); here, intent had not been eliminated as a factual issue in the case.

[3] Petitioners' counsel's statement at the time of Carpenter's testimony on the other incidents of bid rigging that Dellinger did not rely on lack of intent (J.A. 156-157) did not remove the issue from the case as in *United States* v. *Figueroa*, 618 F.2d 934, 941 (2d Cir. 1980). The court explained in *Figueroa* that defense counsel who wish to remove the issue of intent from a case must do so "with sufficient clarity that the trial court will be justified * * * in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed." *Id.* at 942. In this case, the intent to enter into a bid rigging conspiracy is an essential element of the prosecution's case, and the defendant simply could have relied on the failure of the government's proof of intent without putting on any evidence of his own. Petitioners cannot deny the government the right to introduce evidence on intent while insisting upon a jury instruction requires the government to prove it.

Under Fed. R. Evid. 403, the trial court must also consider whether the probative value of evidence, such as testimony regarding other crimes, is substantially outweighed by the danger of unfair prejudice. This balancing is subject to review for abuse of discretion. Here, the trial court found that it had " 'no hesitance in finding that the probative value of this evidence would substantially outweigh any unfair prejudice' " (see Pet. 10), and the court of appeals concluded that this determination should be upheld (Pet. App. 27).

Petitioners correctly note (Pet. 9-10) that, in describing the balancing function under Rule 403, some courts of appeals have said that the evidence of other acts must be "clear and convincing" in order to be admissible.[4] The decision below, however, is fully in accord with these statements. The testimony at issue was that of an eyewitness and confessed co-conspirator. The evidence related to very similar offenses close in time to the offense for which Dellinger was on trial, and therefore it was highly probative of Dellinger's intent to enter into a bid rigging arrangement with respect to the Lancaster project. Plainly, this evidence satisfied the "probative value" requirement of Rule 403. Any weakness in the testimony was solely a matter of credibility which, as the district court noted, was a matter for the jury to determine (J.A. 206), not the court. Those courts that have used the "clear and convincing evidence" language relied upon by petitioners generally have disavowed any intent to invade the province of the jury by attempting to assess credibility; rather, they "limit themselves to examining whether the *type* of evidence is sufficiently probative"

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[4]See *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir. 1985), cert. denied, No. 84-1654 (Oct. 7, 1985); *United States* v. *Bronco*, 597 F.2d 1300, 1302-1303 (9th Cir. 1979); *United States* v. *Dolliole*, 597 F.2d 102, 106-108 (7th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Cobb*, 588 F.2d 607, 612 (8th Cir. 1978).

and "sufficiently advances the inquiry to offset any unfair prejudice." *United States* v. *Moore*, 732 F.2d 983, 988 & 989 n.45 (D.C. Cir. 1984) (emphasis in original). See also *United States* v. *Dolliole*, 597 F.2d 102, 107-108 (7th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Dabish*, 708 F.2d 240, 243 n.2 (6th Cir. 1983).[5] Hence, there is no basis for petitioners' suggestion that the decision below creates a conflict in the circuits; even in those circuits that have articulated a "clear and convincing" standard, the district court's decision here to admit the other crimes evidence would have been upheld.[6]

2. Rule 608(b) of the Federal Rules of Evidence limits the evidence that can be used to attack the credibility of a witness. The Rule provides that specific instances of a witness's conduct may not be proved by extrinsic evidence "for the purpose of attacking * * * his credibility." Petitioners contend (Pet. 11-13) that this rule was violated when the trial court allowed a rebuttal witness to testify to Dellinger's bid rigging in Kensington, South Carolina, after Dellinger had denied it. This claim does not merit review.

Petitioners suggest that the court allowed this evidence solely to impeach Dellinger's credibility by impugning his character, thereby allegedly opening the door "to permit the introduction of specific acts of prior misconduct whenever a Defendant takes the stand" (Pet. 12). But the holding of the

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[5]While the Eighth Circuit has not been so explicit, its explanation of the "clear and convincing" test also refers to the adequacy of the evidence to show the relevant elements of the other crime alleged, not the credibility of the witnesses testifying to it. See, *e.g.*, *United States* v. *Clemons*, 503 F.2d 486, 490 (1974).

[6]We note that there is little danger of prejudice to the defense where the evidence falls short of satisfying the "clear and convincing" standard simply because its source is a witness who is not credible. If the jury found Carpenter's recounting of prior bid rigging incidents not credible, it presumably would not credit it. The testimony would then be harmless to the defendants.

court of appeals does not sweep so broadly. The court's decision does not permit the use of extrinsic evidence of prior bad acts to attack a witness's credibility by impugning his character; rather, it carefully limited the use of such evidence to situations where it is "probative of a material issue in a case" — in this case, Dellinger's intent (see Pet. App. 25). So limited, the court's holding is entirely consistent with the decisions of other circuits and with the purposes of Rule 608(b).

Rule 608(b) is designed to expedite trials and to protect witnesses by excluding extrinsic evidence of specific instances of conduct when it is used only to show that a witness is a "bad person" who should not be believed. *United States* v. *DiMatteo*, 716 F.2d 1361, 1365-1367 (11th Cir. 1983), vacated on other grounds, No. 83-1554 (Jan. 7, 1985), on remand, 759 F.2d 831 (1985); *United States* v. *James*, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); *United States* v. *Opager*, 589 F.2d 799, 801 (5th Cir. 1979). The Rule does not eliminate, however, the common law principle of "specific contradiction," which states that extrinsic rebuttal evidence is admissible to contradict a statement made by the witness, so long as "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction." IIIA, *Wigmore on Evidence* § 1003, at 961 (Chadbourne rev. 1970) (emphasis omitted). See 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶¶ 607[05], 608[05] (1985); *Simmons, Inc.* v. *Pinkerton's, Inc.*, 762 F.2d 591, 604-605 (7th Cir. 1985); *Head* v. *Halliburton Oilwell Cementing Co.*, 370 F.2d 545, 546 (5th Cir. 1966). Admissible evidence is not rendered inadmissible just because the defendant testifies falsely concerning it. Having found evidence of other incidents of bid rigging by Dellinger material to the issue of intent and thus admissible as part of the prosecution's case-in-chief under Rule 404(b), the court of appeals

correctly found that the rebuttal evidence of another incident was not collateral and hence not excluded under Rule 608(b). *United States* v. *Opager*, 589 F.2d at 801-803; see also *United States* v. *Halbert*, 712 F.2d 388, 390-391 (9th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982); *United States* v. *Jacobson*, 578 F.2d 863, 866-867 (10th Cir. 1978). See generally 3 J. Weinstein & M. Berger, *supra* ¶ 608[05], at 608-23 & n.10. The evidence was introduced to contradict Dellinger's testimony regarding a material issue that could have been raised in the government's case-in-chief, not to bolster a line of cross-examination relating solely to credibility.

Petitioner's assertion that the decision below will open the gates to routine use of bad acts to impeach witness-defendants on rebuttal is unfounded. First, the rebuttal must go to a material issue, not just to general credibility. Second, it must suggest the falsity of a statement on direct examination or in response to a question that is within the scope of legitimate cross-examination. Thus, for example, both *Agnello* v. *United States*, 269 U.S. 20 (1925), and *United States* v. *Pantone*, 609 F.2d 675 (3d Cir. 1979), relied upon by petitioners (Pet. 11-12), are fully consistent with the decision below. In both of those cases, the cross-examination that formed the predicate for admission of the evidence in question was itself improper and permitted only over the defendant's objection, which made the rebuttal improper. See 269 U.S. at 35; 609 F.2d at 680-681; see also *United States* v. *Havens*, 446 U.S. 620, 625 (1980). And in *Pantone*, the court noted that the evidence in question probably would not have been admissible under Rule 404(b). See 609 F.2d at 681. In this case, no objection was ever made to the cross-examination of Dellinger on the

subject of other offenses.[7] The court of appeals' decision in this case is specifically conditioned on the propriety of, or lack of objection to, the underlying cross-examination (Pet. App. 26), and therefore it would not suggest a different result in *Agnello* or *Pantone*. Moreover, the court also conditioned receipt of such rebuttal evidence on close scrutiny by the district court to ensure that it is neither a belated attempt to prove an essential element of the crime charged that should have been introduced during the government's case in chief nor cumulative evidence that ought to be excluded as unduly prejudicial under Rule 403 (*ibid.*). The court's careful and narrow ruling does not warrant review by this Court.

3. The district court instructed the jury (see Pet. App. 39-40) that it could convict the petitioners only if it found that they "knowingly formed, joined or participated in a combination or a conspiracy to allocate the projects as described in the indictment, or to submit collusive and noncompetitive bids on the project" — a per se violation of the Sherman Act. Petitioners contend (Pet. 16-18) that this instruction was inadequate. Relying on *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), they assert that the jury should have been instructed that it must also find a specific intent unreasonably to restrain trade. This contention is without merit.

In *Gypsum*, the Court held that it was necessary to prove an intent to restrain trade in prosecutions arising out of agreements that are judged under a rule of reason, *i.e.*, where the legality of the agreements depends on their effects in specific cases. The Court held that the intent requirement

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[7]Dellinger's counsel objected to the relevance of certain exhibits the government introduced in connection with its cross-examination of Dellinger on other incidents of bid rigging (J.A. 568-572, 575-576) but made no other objection to the line of questioning.

of the criminal provisions of the Sherman Act would be satisfied if the agreement were undertaken either with a purpose of restraining trade, or "with knowledge of its probable consequences and having the requisite anticompetitive effects." 438 U.S. at 444 & n.21. The Court specifically noted, however, that it was not dealing with "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." *Id.* at 440. The illegality of a per se violation is knowable without foreseeing its effects, and there is no danger that criminalizing the knowing participation in a *per se* illegal conspiracy will "criminalize a broad range of apparently innocent conduct" (see *Liparota* v. *United States*, No. 84-5108 (May 13, 1985), slip op. 6-7), or deter any beneficial conduct. An individual who knowingly conspires to commit an action that is per se illegal, such as bid rigging, necessarily has the intent unreasonably to restrain trade. Therefore, the court of appeals correctly upheld the district court's instructions, and its decision accords with that of every other court of appeals that has faced the issue. See *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 683-684 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 295 n.6 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-464 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1104-1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

4. The trial court gave an extensive instruction on reasonable doubt. It charged, inter alia, that: "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters in your own life." It then noted that the defendant had no burden to produce evidence but could rely on gaps in the prosecution's evidence, and concluded that: "A reasonable doubt exists in any case when after a careful and

impartial consideration of all of the evidence, you jurors do not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges against him." Pet. App. 37. Petitioners objected, requesting a charge that the evidence must be such that the jurors "would unhesitatingly be willing to rely upon it" (Pet. App. 38). The trial court refused that instruction, and the court of appeals affirmed. Relying on its recent decision in *United States* v. *Moss*, 756 F.2d 329, 333-334 (4th Cir. 1985), the court held that the term "reasonable doubt" is "self-explanatory," but that the district court's further explanation, when read in the context of the whole instruction, was "neither incomprehensible nor sufficiently misleading" to require reversal (Pet. App. 30-31).

The court of appeals was correct. There is no talismanic phraseology for defining the concept of reasonable doubt. See *In re Winship*, 397 U.S. 358, 369-370 (1970) (Harlan, J., concurring); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 500, at 806-813 (1982).[8] Nothing in the Court's instruction was misleading, and there is no likelihood that it could have led the jury to convict when the jury in fact had a reasonable doubt. See generally *Holland* v. *United States*, 348 U.S. 121, 140 (1954).

5. During its deliberations, the jury requested that the testimony of Carpenter and Zeigler, the government's chief witnesses, be read back to it, specifically including everything relating to the transactions on the evening of December 18 and the morning of December 19, 1978 (J.A. 40-41, 800-801). Carpenter's testimony was read, and then a dinner recess was taken from 7:44 p.m. to 9:30 p.m. (J.A. 813-814). During the recess, Dellinger's counsel discussed

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[8] While the Court approved a "hesitate to act" formulation in *Holt* v. *United States*, 218 U.S. 245, 254 (1910), it did not suggest that the word "hesitate" was an essential element of any instruction.

with a government attorney the possibility of editing some of Zeigler's testimony to shorten the reading, but the discussions were ended by another government attorney who felt that such editing could not be done fairly, and, moreover, as he explained to the magistrate who was presiding in the trial judge's absence, Zeigler's testimony did not have as much introductory material as Carpenter's (J.A. 821-823, 829). When the jury returned, the magistrate explained to them that an attempt had been made to shorten the reading, but that counsel had been unable to agree "because apparently the next witness' testimony goes more directly into the circumstances that you want to hear than the previous witness' testimony" (J.A. 816). Zeigler's testimony was then read, and the jury retired for the night. The following morning, before the jury resumed its deliberations, the magistrate told the jury that he had made that remark "solely because I was advised that the testimony of the second witness had less introductory matter," and that the weight to be given the testimony was for the jury alone to determine (J.A. 842-843).

Petitioners contend (Pet. 13-14) that they were prejudiced by the magistrate's comment about the "directness" of the testimony, asserting that the jury thereby understood that the testimony was more believable. Even if petitioners were correct that this fairly innocuous comment was prejudicial standing alone, they fail to explain why any possible misapprehension was not dispelled by the magistrate's explanation the following day. The court of appeals correctly concluded that the magistrate's "explanatory instructions rendered his earlier statement harmless" (Pet. App. 31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

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